United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1564

To be argued by
HENRY J. BOITEL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1564

B P/s

UNITED STATES OF AMERICA,

Appellee,

-vs.-

ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN,

Appellants.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF IN BEHALF OF APPELLANT WILLIAM SCOTT

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Questions Presented for Review

1. Did the government fail, as a matter of law, to establish the attempted bank robbery charged by counts 2 and 3 of the indictment, since the evidence did not satisfy the requirements of the first paragraph of sub-section A of 18 U.S.C. §2113? Is it not true that the paragraph in question, by its explicit terms, prohibits the attempted taking of property when that attempt-

ed taking is, in fact, preceded by force and violence, or by intimidation?

2. Did the government fail to establish that the defendant violated 26 U.S.C. § 5861(d), since he was not shown to be in receipt or possession of a firearm to the extent contemplated by the statute?

3. Should the judgment of conviction be reversed, in whole or in part, for the additional reasons set forth in the briefs of the co-appellants Robert Jackson and Martin Allen?

Preliminary Statement

William Scott appeals from a judgment of conviction entered after a trial before the Honorable Jacob Mishler, Chief Judge of the United States District Court for the Eastern District of New York, after a non-jury trial. Scott was convicted upon each of the four counts of the indictment which, respectively, charged: 1) Conspiracy to commit armed bank robbery (18 U.S.C. § 371); 2) Attempted armed bank robbery on June 14, 1976 (18 U.S.C. § 2113[a]); 3) Attempted armed bank robbery on June 21, 1976 (18 U.S.C. §2113[a]); and 4) Possession of two unregistered sawed-off shotguns (26 U.S.C. §5861[d]).

On November 23, 1976, Scott was sentenced to serve concurrent terms of imprisonment, as follows: Count 1--five years, Count 2--seven years, Count 3--seven years, and Count 4--seven years.

At trial, Scott was represented by Robert J. Riordan, Esq.,

who had been assigned by the District Court. On this appeal, Scott is represented by Henry J. Boitel, Esq., who has been assigned by this Court.

Statement of Facts

On June 14, 1976, Scott, together with the co-defendants Robert Jackson and Martin Allen and an unindicted co-conspirator, Vanessa Hodges, allegedly went to the Manufacturers Hanover Trust Bank, at 210 Flushing Avenue, Brooklyn, New York, with the intent of robbing the bank. After conducting an internal and external surveillance of the bank, they determined that the circumstances were not propitious and that they ought acquire certain additional paraphernalia, such as gloves, before attempting to accomplish the crime.

On June 18, 1976, Vanessa Hodges was arrested on other charges, and revealed the alleged plot to federal authorities (Tr. 18, 32-34).*

As a result, FBI agents were "staked-out" in the vicinity of the bank on the morning of June 21, 1976, upon the possibility

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*References preceded by "Tr." are to the trial transcript of August 30, 1976. References preceded by "H." are to the pre-trial search and seizure suppression hearing of July 23, 1976. The joint appendix filed by the appellants is divided into Sections A, B, D and D, and the documents contained in the appendix retain their original pagination. Those documents are as follows: (A) Docket entries, (B) Indictment, (C) Judge Mishler's memorandum opinion of August 9, 1976, which denied suppression of the seized evidence, and (D) Judge Mishler's memorandum opinion of September 22, 1976, which found each of the defendants guilty upon each of the counts of the indictment.

that the bank robbery might be attempted on that day. There was doubt as to whether the alleged plot would go forward since, in the interim, Vanessa Hodges had made a telephone call to Allen, who told her, "that he wasn't going to do the job...because I [Hodges] got busted and the Feds would be watching." (Tr. 34).

At about 7 A.M., on June 21, 1976, the agents observed a four-door brown Lincoln sedan, with three black males, proceed past the bank. Over the next half hour, the agents observed the car and its occupants engaging in what they deemed to be suspicious activity. Suddenly, the car sped away from the scene, and the agents concluded that the occupants had become aware of the stake-out. The agents pursued the vehicle, arrested the three defendants, and observed two sawed-off shotguns, masks and handcuffs which, allegedly, were visibly contained in a partially open suitcase.

Judge Mishler conducted a hearing on August 9, 1976, with respect to whether probable cause existed for the search and seizure of the items in the car and for the arrest of the defendants. He concluded that the information supplied by Vanessa Hodges was an insufficient basis for probable cause (due to the lack of a showing of prior reliability), but found that the weapons, etc., which protruded from the allegedly open suitcase supplied sufficient confirmation of Vanessa Hodges information to provide the requisite probable cause. (C. 4).

At the trial, Vanessa Hodges testified as a government witness and inculpated each of the three defendants in the alleged plot. A number of FBI agents testified with respect to their observations on June 21, 1976, which led to the arrest of the

defendants. Additionally, the testimony adduced at the pre-trial suppression hearing was incorporated by reference at the trial, exclusive of any hearsay which had been received at the hearing (Tr. 65-66).

Counsel has carefully reviewed the hearing and trial testimony, and does not deem it necessary to set forth that testimony in detail since it is adequately summarized in Judge Mishler's opinions (C. 1, et. seq.: D. 1, et. seq.).

Argument

POINT I

THE PARAGRAPH OF THE BANK ROBBERY STATUTE UNDER WHICH THE DEFENDANT WAS CHARGED PROHIBITS ONLY THE ATTEMPTED TAKING OF PROPERTY WHERE SUCH ATTEMPTED TAKING IS ACTUALLY PRECEDED BY FORCE, VIOLENCE OR INTIMIDATION. SINCE THE ATTEMPTED TAKING IN THE PRESENT CASE WAS NOT, IN FACT, PRECEDED BY THE USE OF FORCE, VIOLENCE OR INTIMIDATION, NO VIOLATION OF THAT STATUTORY PROVISION OCCURRED.

In his opinion finding the defendants guilty, Judge Mishler characterized the charges of counts 2 and 3 as "attempted armed bank robbery" on June 14, 1976 and June 21, 1976, respectively. (D. 1). In fact, that phraseology is not to be found in 18 U.S.C. § 2113 or in the indictment. The use of such a shorthand characterization of a substantive offense, particularly within the context of a discussion of the law of attempt, masked the true problem of statutory construction which exists in this case.

18 U.S.C. § 2113(a) provides as follows:

> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take,

> from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> shall be fined not more than Five thousand ($5,000.00) dollars or imprisoned not more than twenty (20) years, or both." [Emphasis added]

Counts 2 and 3 of the indictment are identical, except for the naming of Vanessa Hodges as an accomplice in Count 2, and the different dates involved in each count. The only crime charged by those counts is the crime defined by the first paragraph of 18 U.S.C. §2113(a). Thus, Count 2 reads as follows:

> "On or about the fourteenth day of June 1976, within the Eastern District of New York, the defendants ROBERT JACKSON, WILLIAM SCOTT, and MARTIN ALLEN, and Vanessa Hodges, named herein as a co-conspirator but not as a defendant, did attempt to knowingly, willfully and feloniously, by force, violence and intimidation take from the person and presence of employees of the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York, United States currency, which money was in the care custody, control, management and possession of the said Manufacturers Hanover Trust, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2)." (B. 3)

The United States Code does not contain a general provision

for the crime of attempt. United States v. Stallworth, 543 F. 2d 1038, 1039 fn. 1 (2d Cir., 1976); United States v. Rosa, 404 F. Supp. 602 (D. Pa., 1975).

Indeed, Rule 31(c) of the Federal Rules of Criminal Procedure provides: "the defendant may be found guilty...of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." [Emphasis added].

In his opinion, finding the defendants guilty of the attempts charged by counts 2 and 3, Judge Mishler, while not discussing the problem, assumes that the use of the word "attempt" in the first paragraph of §2113 applies to all of the activities described in that first paragraph. However, a careful reading of the statute reveals this not to be the case:

> "Whoever, by force and violence, or by intimidation, takes or attempts to take...any property...belonging to...any bank..." [Emphasis added]

The paragraph does not speak of attempted force, violence, or intimidation, but only of attempted taking. Thus, the statute clearly contemplates the actual use of force, violence, or intimidation which results in the actual taking or attempted taking of property. By the very terms of the statute, the attempt commences with the use of force, violence or intimidation. If, thereafter, no property is taken, for whatever reason, then the attempt is complete. If the property is taken, the substantive offense is complete.

In the United States v. Baker, 129 F. Supp. 684 (S.D. Cal.,

C. D., 1955), the Court held:

> "It is apparent that in the statute under consideration [18 U.S.C. §2113(a)] the 'attempt' relates to the taking and not to the intimidation. Thus, what is involved in this indictment is an attempted taking by intimidation, the means being intimidation, or putting in fear instead of by force." (129 F. Supp. at 686) [Emphasis in original]

In United States v. Brown, 412 F. 2d 381 (8th Cir., 1969) the Court held that a charge under the first paragraph of §2113(a), "placed on the government the burden of proving that intimidation was used in the attempted robbery of the financial institution." (412 F. 2d at 382). The Brown opinion also quoted, with approval, the above quoted holding in United States v. Baker, supra (412 F. 2d at 383).

We are aware that this Court, in United States v. Stallworth, 543 F. 2d 1038 (2d Cir., 1976), was recently confronted with a case substantially similar on its facts, to the present case, except for the fact that the occupants of the car in Stallworth had actually started to open the doors of the bank when the agents interceded and arrested them. The opinion in Stallworth does not indicate an awareness of the problem of statutory construction which we have argued in this brief. As with Judge Mishler's opinion, there is a good deal of discussion concerning the law of attempt, in the abstract, and without reference to the specific provision of the statute.

Only two bank robbery precedents are cited by Stallworth (543 F. 2d at 1041). Significantly, United States v. Foster, 478 F. 2d 1001 (7th Cir., 1973), involved the second paragraph of 18 U.S.C. §2113(a), and is, therefore, thoroughly distinguishable.

United States v. Bussey, 507 F. 2d 1096 (9th Cir., 1974), does not indicate which paragraph of the sub-section was there involved. Similarly, Rumfelt v. United States, 445 F. 2d 134 (7th Cir.), cert. denied, 405 U.S. 853 (1971), the only case cited in Judge Mishler's opinion (D. 11), also involved only the second paragraph of the sub-section.

We respectfully submit that the government failed to establish the elements of the crime of attempt charged by Counts 2 and 3 of the indictment. The judgment of conviction as to those counts should be reversed, with the direction that judgments of acquittal be entered.

POINT II

PROOF FAILED TO ESTABLISH THE DEFENDANT SCOTT'S GUILT OF RECEIVING OR POSSESSING A FIREARM NOT REGISTERED TO HIM, IN VIOLATION OF 26 U.S.C. § 5861(d).

26 U.S.C. § 5861(d) provides as follows:

"It shall be unlawful for any person--

***

(d) to receive or possess a firearm which is not registered to him in the National Firearm's Registration and Transfer Record; ***" [Emphasis added]

Count 4 of the indictment charged as follows:

"On or about the 21st day of June, 1976, within the Eastern District of New York, the defendants Robert Jackson, William Scott and Martin Allen knowingly and unlawfully did possess 'firearms' as defined by Title 26, United States Code, § 5845(a), to wit, two single-barrelled 'pump action twelve gauge sawed-off shotguns having barrells of less than 18 inches in length, said sawed-off shotguns not having been registered to the defendants in

the National Firearms Registration and Transfer Record. (Title 26, United States Code, §5861(d) and 5871 and Title 18, United States Code, § 2).

We have examined many opinions which discuss a joint responsibility for violation of the Federal Firearms Laws, but none of the opinions mentions the specific problem of statutory construction which we are about to discuss. See: United States v. Holt, 427 F. 2d 1114 (8th Cir., 1970); United States v. Black 472 F. 2d 130 (6th Cir., 1972); United States v. Shephard, 439 F. 2d 1392 (1st Cir., 1971); United States v. Palmer, 435 F. 2d 653 (1st Cir., 1970).

In the present case, there was no evidence that the defendant Scott owned, actually possessed, exercised dominion over, or even touched the two sawed-off shotguns in the present case. To the contrary, the testimony of the government witness Vanessa Hodges was that the two shotguns were the property of the co-defendant Allen (Tr. 12, 16-19, 25-27). Moreover, since there were three alleged perpetrators and only two shotguns, there is no evidence that the defendant Scott had any intention of possessing either of the shotguns (one of which was broken) during the intended robbery.

In view of the facts, the only way that the District Court could have found Scott guilty of the crime of receiving or possessing a firearm "not registered to him" would be on a theory of constructive possession. However, the very wording of the statute indicates that the normal rules of constructive possession are inapplicable to this statute. Assume, for the moment, that the shotgun in question had been registered to Allen and that all of the remaining facts in

the case were the same. If merely being part of a joint bank robbery venture constituted constructive possession of the gun, under the statute, then Scott would nevertheless be guilty, even though the firearm was registered.

Alternatively, assume that the firearm was registered, and that Scott was merely transporting Allen upstate on a hunting trip. Is it conceivable that Congress intended that Scott would be in violation of the statute under those circumstances? One can readily imagine a number of additional similar situations.

In short, the statute is so specific in its prohibition ("not reigstered to him") that application of the rules of constructive possession, merely by virtue of participation in a joint venture, is not appropriate. There must be some actual possession, ownership, or control of possession exercised by the person sought to be charged. In this case, there is no evidence that Scott engaged in any such conduct. For that reason the judgment of conviction with respect to Count 4 should be reversed as to him.

Statement Pursuant to F.R.A.P. Rule 28(i)

The appellant Scott hereby adopts by reference all applicable arguments contained in the briefs of the co-appellants.

Conclusion

For all the above reasons, the judgments of conviction as to Counts 2, 3 and 4 should be reversed, with the direc-

tion that a judgment of acquittal be entered as to each of those counts.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
William Scott

New York, New York
January 19, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, : Docket No.

-vs.- : AFFIRMATION OF SERVICE

ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN :

:

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HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court, affirms the following to be true under penalties of perjury, pursuant to Rule 2106 CPLR:

1. On this date I served 1 copy of the following document upon the United States Attorney for the Eastern District of New York, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, by depositing same in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service within the State of New York: Brief in behalf of Appellant William Scott.

New York, New York
January 21, 1977

HENRY J. BOITEL